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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WARREN LEE KELLEY, Defendant and Appellant.	B191824 (Los Angeles County Super. Ct. No. BA264593)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth A. Kwan, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Warren Lee Kelley entered a plea of no contest to arson in violation of Penal Code section 451, subdivision (b).[1] In a separate proceeding, the trial court found defendant had suffered a serious felony prior conviction (§ 667, subd. (a)), a conviction pursuant to the three strikes law (§ 667, subds. (b)-(i) and § 1170.12, subds. (a)-(d)), and had served four prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to 12 years in state prison, comprised of the low term of three years for arson, doubled pursuant to the three strikes law, enhanced by five years for the serious felony prior conviction, and one year for a prior prison term. The remaining prior prison term allegations were stricken.

In this timely appeal, defendant argues the record does not support the trial court's finding that his prior conviction under section 245, subdivision (a)(1), was a serious felony.

DISCUSSION

Defendant challenges the trial court's finding that his prior conviction under section 245, subdivision (a)(1), was a serious felony. There are two distinct offenses set forth in section 245, subdivision (a)(1): assault with a deadly weapon and assault by means of force likely to produce great bodily injury. The former offense is a serious felony; the latter offense is not. (*People v. Winters* (2001) 93 Cal.App.4th 273, 276-280 [only those violations of § 245, subd. (a)(1) that are listed in § 1192.7, subd. (c) are serious felonies; assault by means of force likely to inflict great bodily injury is not listed].) If defendant is correct and his prior conviction under section 245, subdivision (a)(1), was not for assault with a deadly weapon, we must reverse both the five-year enhancement under section 667, subdivision (a), and the finding that defendant had a prior conviction under the three strikes law.

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[1] All further statutory references are to the Penal Code.

When a prior conviction is not a serious felony as a matter of law, "the trier of fact may look to the entire *record of conviction* to determine the substance of the prior conviction." (*People v. Reed* (1996) 13 Cal.4th 217, 223; *In re Taylor* (2001) 88 Cal.App.4th 1100, 1107-1108.) The inquiry permits consideration of the preliminary hearing transcript of the alleged prior conviction. (*People v. Reed*, *supra*, 13 Cal.4th at p. 223; *People v. Houck* (1998) 66 Cal.App.4th 350, 355-356 [use of preliminary hearing transcript under *Reed* is limited to cases resolved by plea, rather than by trial.]) The determination whether a prior conviction is of a serious felony "is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law. [Citation.] The need for such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation], but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*People v. McGee* (2006) 38 Cal.4th 682, 706.)

Three documents were introduced in the trial court on the issue of whether defendant's prior conviction under section 245, subdivision (a)(1), was a serious felony. The first item considered was the felony information in case No. A810651, in which defendant was charged in count 3 with "the crime of ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245 (a)(1), a Felony . . . ." The charge alleged defendant "did willfully and unlawfully commit an assault upon Glenn Laiken with a deadly weapon, to wit, an automobile, and by means of force likely to produce great bodily injury." Because the charging language includes both a serious felony—assault with a deadly weapon—and

the offense of assault by means of force likely to produce great bodily injury, which is not a serious felony, the information does not establish that defendant's prior conviction was a serious felony as a matter of law.

The second document introduced was the minute order reflecting defendant's guilty plea. According to the minute order, defendant plead guilty to a felony charge of violating section 245, subdivision (a)(1). Again, the minute order does not indicate whether defendant committed an assault with a deadly weapon as opposed to an assault by means of force likely to produce great bodily injury. The minute order does not establish that the prior conviction was a serious felony.

The third document introduced at trial on the prior conviction allegation was the felony preliminary hearing transcript in case No. A810651. According to the preliminary hearing transcript, Glenn Laiken parked his 1977 Porsche behind his restaurant in Encino on August 21, 1985. When Laiken heard the engine of his car start, he looked toward the parking lot and saw defendant in the Porsche, backing out of its parking spot. After yelling at defendant that he could not steal his car, Laiken ran in front of the Porsche. Defendant put the car in first gear and drove toward Laiken. Laiken jumped over the front left bumper in order to avoid being struck by the car. Laiken put his hands on the car and pushed himself to avoid being hit. Laiken "had no other choice but to be run over or move away from the car."

Our task is to examine the preliminary hearing transcript "to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*People v. McGee*, *supra*, 38 Cal.4th at p. 706.) We conclude the trial court properly found the prior conviction was an assault with a deadly weapon, and therefore a serious felony.

There is no question that a car may be a deadly weapon for purposes of section 245, subdivision (a)(1). (*People v. Russell* (2005) 129 Cal.App.4th 776, 782; *People v. Wright* (2002) 100 Cal.App.4th 703, 706; *In re Brian F.* (1985) 167 Cal.App.3d 672, 675.) "Thus, any operation of a vehicle by a person knowing facts that would lead a reasonable person to

realize a battery would probably and directly result may be charged as an assault with a deadly weapon." (*People v. Wright*, *supra*, 100 Cal.App.4th at p. 706.)

Defendant drove toward Laiken, who was screaming and standing in front of the Porsche, causing Laiken to jump out of the way in order to avoid being run over by the car. Defendant's decision to assault Laiken with the Porsche enabled defendant to effectuate his escape with the stolen vehicle. Under these facts, defendant was aware that his act "'by its nature would probably and directly result in the application of physical force on another person.'" (*People v. Williams* (2001) 26 Cal.4th 779, 783.)

Contrary to defendant's argument, Laiken's conduct does not absolve defendant's criminal culpability for assault with a deadly weapon. Defendant had no right to steal Laiken's Porsche, and Laiken had every right to attempt to stop the theft. Defendant made the choice of placing the car in gear, disengaging the clutch, and driving toward Laiken. That Laiken was nimble enough to avoid being struck does not mean defendant did not commit an assault with a deadly weapon.

To the extent defendant challenges the reasoning in *Williams*, the issue has been resolved for our purposes by a binding decision of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We conclude the record of the prior felony conviction demonstrates that the conviction was of the type that subjects defendant to increased punishment under California law. (*People v. McGee*, *supra*, 38 Cal.4th at p. 706.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.
MOSK, J.